Supreme Court, U.S.
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No. 02-856

In the Supreme Court of the United States

FEDERAL AVIATION ADMINISTRATION, PETITIONER

v.

CITY OF ALAMEDA, CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, BERKELEY KEEP JETS OVER THE BAY COMMITTEE, PORT OF OAKLAND, AND COMMISSIONERS, PORT OF OAKLAND, RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI AND TO MOTION TO VACATE

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CORPORATE DISCLOSURE STATEMENT

Respondent Citizens League for Airport Safety and Serenity ("CLASS") is a not-for-profit corporation. Pursuant to Supreme Court Rule 29.6, CLASS states that no parent or publicly held companies own 10% or more of its stock.

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Respondents City of Alameda, Citizens League for Airport Safety and Serenity, and Berkeley Keep Jets Over the Bay Committee (collectively, "Respondents") respectfully submit this memorandum in response to the February 19, 2003, letter from the Clerk advising that the Court had directed it to "request that a response be filed to the petition for writ of certiorari and the motion to vacate." Respondents had previously waived their right to respond in accordance with Supreme Court Rule 15.5.

The underlying dispute between these Respondents and co-respondents Port of Oakland and Board of Port Commissioners has been settled. The parties' settlement agreement was reached on October 8, 2002, approximately two months before the Federal Aviation Administration filed its petition for writ of certiorari. (The FAA is not a party to the settlement agreement and was not involved in the settlement negotiations.) The FAA referenced the settlement agreement in its petition, disclosed that

the underlying case may soon be dismissed with prejudice, and signaled its intention, once that occurred, to move this Court to vacate the judgment of the court of appeals. Petition at 14 n.5. That is precisely what has occurred. The district court dismissed the action with prejudice on December 20, 2002, and the FAA filed its motion to vacate on February 5, 2003. *See* motion to vacate at 2a.

In light of the parties' settlement and the dismissal of the case, the Respondents take no position with respect to either the FAA's petition for writ of certiorari or its motion to vacate. For the same reasons, Respondents would respectfully decline to participate if the Court were to consider the merits of the jurisdictional ruling by the court of appeals. However, prior to the settlement and the court of appeals' decision, Respondents had filed their petition for review in the Ninth Circuit on the basis of their understanding that then-existing precedent indicated the court of appeals had exclusive jurisdiction over such petitions pursuant to 49 U.S.C. 46110(a). A copy of the Statement of Jurisdiction from Respondents' opening appellate brief is reprinted in Appendix A hereto.

One final point bears mention. On February 11, 2003, the United States Court of Appeals for the Second Circuit issued a decision that adheres to the jurisdictional ruling and rationale of the Ninth Circuit in this case. *Committee to Stop Airport Expansion v. FAA*, ___ F.3d ___, 2003 U.S. App. Lexis 2404 (2d Cir. February 11, 2003). Respondents are aware of no impediment to the FAA filing a petition for certiorari in that case. This Court thereby would have an opportunity, should it so desire, to address the jurisdictional issue in the context of a live controversy, perhaps obviating the asserted reason for review or vacatur of the decision in this now-moot case.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 01-70169

CITY OF ALAMEDA, A MUNICIPAL CORPORATION; CITIZENS LEAGUE FOR AIRPORT SAFETY AND SERENITY, A-NOT-FOR-PROFIT CORPORATION; BERKELEY KEEP JETS OVER THE BAY, AN UNINCORPORATED ASSOCIATION, PETITIONERS

v.

UNITED STATES DEPARTMENT OF TRANSPORTATION; NORMAN Y. MINETA, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF TRANSPORTATION; FEDERAL AVIATION ADMINISTRATION; JANE F. GARVEY, IN HER OFFICIAL CAPACITY AS ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION; WILLIAM WITHYCOMBE, IN HIS OFFICIAL CAPACITY AS REGIONAL ADMINISTRATOR OF THE FEDERAL AVIATION ADMINISTRATION; PORT OF OAKLAND; AND BOARD OF PORT COMMISSIONERS, PORT OF OAKLAND, RESPONDENTS

PETITION FOR REVIEW OF DECISION
OF FEDERAL AVIATION ADMINISTRATION

PETITIONERS' OPENING BRIEF

(List of counsel is on next page.)

(pages omitted)

STATEMENT OF JURISDICTION

The Record of Decision constitutes a Final Order of the Federal Aviation Administration ("FAA") subject to review by this court pursuant to 49 U.S.C. § 46110. *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir. 1998). This case raises no constitutional claims which would permit review in the district court. *Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir. 1998) (distinguishing district and circuit court jurisdiction as follows: "[d]oes the appeal broadly challenge the constitutionality of the FAA's action — in which case the district court could have jurisdiction — or is the appeal 'inescapably intertwined with a review of the procedures and merits surrounding the FAA's order'?").[1] *See also, Foster v. Skinner*, 70 F.3d 1084, 1087-1088 (9th Cir. 1995).

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[1] In one case, this circuit found that where a petitioner challenged the FAA's revenue use restrictions in its interpretation of the FAA Reauthorization Act of 1996, the action was reviewable only in the district court. *City of Los Angeles v. FAA*, 239 F.3d 1033 (9th Cir. 2001). The court found subject matter jurisdiction lacking under 49 U.S.C. 46110(a) where petitioners made a broad constitutional challenge to an action wholly within Part B of Title 49 Subtitle VII because the appellate court jurisdictional grant applied to Part A. This decision does not affect the court's subject matter jurisdiction in this case because the petitioners raise no constitutional challenges to the FAA actions. *Crist v. Leippe*, 138 F.3d at 804 ("a broad constitutional challenge is a necessary predicate to district court jurisdiction" over FAA orders). Moreover, unlike the situation in *City of Los Angeles v. FAA*, the FAA actions were taken pursuant to both sections A and B of Title 49 Subtitle VII. *See, e.g.*, Petitioners' Excerpts of Record ("PER") 6:01404 (authorizing unconditional approval of the Airport Layout Plan "pursuant to 49 U.S.C. 47107(a)(16) [Part B] and 40103(b) [Part A]") and at 17 ("These decisions . . . are taken pursuant to 49 U.S.C. 40101 *et seq.* [Part A] and 49 U.S.C. 47101 *et seq.* [Part B]."). Where jurisdiction could fall in either the district or appellate court, the circuit court is the appropriate forum. *See e.g., Sutton v. United States Dept. of Transp.*, 38 F.3d 621, 625 (1994) ("[C]ourts of appeals, in actions challenging FAA decisions, have uniformly rejected attempts by litigants to bifurcate issues or to cull out independent claims for review in the district court.") The Supreme Court favors review of agency actions in the circuit courts, "absent a firm indication" that Congress intended district court jurisdiction. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744-45 (1985). Therefore, the

Petitioners City of Alameda, the Citizens League for Airport Safety and Serenity and Berkeley Keep Jets Over the Bay Committee participated in the administrative process and exhausted administrative remedies by commenting on the Revised Draft Environmental Impact Statement ("RDEIS"). PER 6:01283-1340, 6:01346-52. A timely Petition for Review was filed on January 30, 2001, amended February 15, 2001. PER 6:01406-09.

FAA correctly asserted that review should be taken in the court of appeals. PER 6:01405 ("These decisions . . . are subject to review by the Court of Appeals of the United States in accordance with the provisions of Section 1006 of the Federal Aviation Act of 1958, as amended, 49 U.S.C. Section 46110.")

Nonetheless, should the court for any reason find that review in the circuit court is not appropriate, petitioners request, pursuant to 28 U.S.C. § 1631, that the action be transferred to the district court in the interest of justice. *See City of Los Angeles v. FAA*, 239 F.3d at 1037.